No. 82-2120

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS F. SMITH, JR., et al.,

Petitioners,

—v.—

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Plaintiffs, won the entirety of the relief sought on the merits: a free appropriate public education for handicapped child. Based upon a common nucleus of operative fact, plaintiffs alleged substantial constitutional claims through 42 U.S.C. § 1983 which were not addressed, a Rehabilitation Act claim which also was not addressed, and a claim under the Education for All Handicapped Children Act on which they prevailed. Plaintiffs were denied all attorneys fees.

I. Can plaintiffs, who allege substantial constitutional claims which are not addressed in view of plaintiffs' total success on a non-fee statutory claim, be denied an award of attorneys fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and contrary to the express intent of Congress?

II. Can plaintiffs, who allege a substantial Rehabilitation Act claim in addition to substantial constitutional claims none of which is addressed in view of plaintiffs' total success on a non-fee statutory claim, be denied an award of attorneys fees under the Rehabilitation Act, 29 U.S.C. § 794a(b), contrary to the express intent of Congress?

LIST OF THE PARTIES

Petitioners, plaintiffs-appellees below, are THOMAS F. SMITH, JR., and URSULA J. SMITH, parents, guardians, and next friends of Thomas F. Smith, III, and THOMAS ["TOMMY"] F. SMITH, III.

Respondents, defendants-appellants below, are WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, and ARTHUR PONARELLI, Rhode Island Commissioner of Education.

The local education agency defendant below, the Cumberland School Committee, is

no longer a party to this proceeding, see infra at 4 n.1.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the First Circuit, reversing the trial court and denying attorneys fees to petitioners, is reported at 703 F.2d 4 (1st Cir. 1983). A copy of the decision, entered on March 24, 1983, is attached hereto as Appendix A, infra at A. 1-21.

The decision of the U.S. District Court for the District of Rhode Island, awarding attorneys fees to petitioners, is unreported. The decision is set forth in a final order entered on June 11, 1982, in an earlier order of June 5, 1982 with two attachments, and in the transcript of the trial court's oral opinion from the bench on April 30, 1982, all of which are attached hereto as Appendix B, infra at A. 22-58.

JURISDICTION OF THIS COURT

The judgment of the U.S. Court of Appeals for the First Circuit was entered on March 24, 1983. Jurisdiction is conferred on this

Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [Sections 1981, 1982, 1983, 1985 and 1988 of U.S.C. Title 42]. . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The section of the Rehabilitation Act authorizing fees, 29 U.S.C. § 794a(b), which was added to the Rehabilitation Act through amendments enacted in 1978, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Petitioners -- plaintiffs below -- obtained the entirety of the relief sought through a permanent injunction on the merits. The issues here do not concern the correctness of the decision on the merits, nor the amount of attorneys fees. Instead, the issues presented here arise from the First Circuit's denial of any attorneys fees to petitioners under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 [hereafter the "Fees Act" or "§ 1988"]; and under the Rehabilitation Act, 29 U.S.C. § 794a(b).

On the merits of this case, which was commenced on November 26, 1976, petitioners sought to secure a free appropriate public education for a handicapped child. A. 1-2, 28. In their amended complaint, petitioners alleged claims under the due process and equal protection clauses of the Fourteenth Amendment; under the Rehabilitation Act, 29 U.S.C. § 794; and under the Education for All Handicapped

Children Act, 20 U.S.C. §§ 1401 et seq. [hereafter sometimes the "EAHCA"]. A. 2-3, 34-35.

After initially securing a preliminary injunction on their due process claim, A. 3, 28, 33, petitioners ultimately obtained all of the relief sought on the merits under the Education for All Handicapped Children Act, A. 5, 29-30, 34. The permanent injunction entered in favor of petitioners on June 4, 1981, A. 5, 29, was affirmed by the First Circuit on January 11, 1982, A. 5, 29-30.

Subsequent to the First Circuit's affirmance on the merits, the trial court on June 11, 1982 awarded $32,109 in fees to petitioners against respondents, the state defendants below.[1/] A. 6, 22. In making this award, the trial court held that petitioners were entitled to fees under the Fees Act and under the Rehabilitation Act despite the fact that the

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1. The local education agency defendant -- the Cumberland School Committee -- never contested petitioners' entitlement to fees; it instead settled the matter by paying $8,000 in fees to petitioners. A. 5, 35-36.

Education for All Handicapped Children Act does not itself expressly authorize fees. A. 39-43. This entitlement, the trial court found, arose from the fact that petitioners had specifically alleged claims under "the due process and equal protection clauses of the 14th Amendment" and under "the Rehabilitation Act." A. 34-35. As to the constitutional claims, not only had petitioners won a preliminary injunction on their due process claim, A. 33, but the court also specifically found that petitioners' "equal protection claim" had been "colorable and non-frivolous":

> Be that as it may, enough has been said to establish that the [petitioners had] made a substantial constitutional claim even if that claim ultimately would not have prevailed. [Petitioners] are therefore entitled to attorney's fees to the extent they have prevailed in an action or proceeding to enforce their 1983 claim. 42 U.S.C. Section 1988.

A. 43. Petitioners accordingly were held entitled to fees.

The First Circuit, in the decision under review here, reversed the award of fees and held that "fees are not available here at all." A. 33.[2/] In its view, fees are altogether unavailable for plaintiffs who allege substantial constitutional claims which are not addressed, who allege a substantial Rehabilitation Act claim which is not addressed, and who prevail instead on a claim under the Education for All Handicapped Children Act, a remedial statute which does not expressly authorize fees. A. 7-21.

In reaching this decision, the First Circuit conceded that the issues presented had been widely litigated in the past two years, and that virtually all of the courts of appeals and district courts that had addressed the

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2. The state defendants below -- respondents here -- raised three issues in the First Circuit: the entitlement issue; and two issues as to the amount of the fee award and as to procedure. A. 7. Since the First Circuit held that petitioners here were not entitled to fees, it did not address the remaining two issues. A. 7. The questions presented here, see supra at i, concern only petitioner's entitlement to fees.

issues had rendered decisions contrary to the conclusion reached by the First Circuit. A. 10-13, 21. Moreover, the First Circuit reached its decision without any reference whatsoever to the legislative history of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988; without any analysis of this Court's holding in Maher v. Gagne, 448 U.S. 122 (1980); and also with no evident consideration of the fee provision in the Rehabilitation Act, 29 U.S.C. § 794a(b).

Petitioners here request this Court to issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit, and to summarily reverse the First Circuit's decision or to set this case for plenary review.

REASONS FOR GRANTING THE WRIT

The denial of a free appropriate education to a handicapped child ordinarily gives rise to three sets of interrelated federal claims arising from the same set of facts: due

process and equal protection claims under the Fourteenth Amendment; a claim under the Rehabilitation Act; and a claim under the Education for All Handicapped Children Act. When the EAHCA claim is dispositive, as it often is in this heavily litigated area, questions then arise as to whether fees are available under the Fees Act and under the Rehabilitation Act in view of the plaintiffs' success on their non-fee claim under the EAHCA.

The fee questions presented here have been addressed in five other courts of appeals' decisions in the past two years. In four of the decisions, rendered in 1982, the courts of appeals allowed fees based on reasoning contrary to that of the First Circuit here but consistent with that of Hensley v. Eckerhart, 51 U.S.L.W. 4552 (U.S. May 16, 1983). See infra at 16-18. A fifth appellate decision provided support for the First Circuit's result. See infra at 18-19. A sixth court of appeals' decision addressed a related issue.

See infra at 19 n.6. Most of the dozens of district court decisions, including the trial court decision reversed by the First Circuit here, have allowed fees contrary to the First Circuit's decision. See infra at 18 n.5.

The split in the circuits caused by the First Circuit's decision on these recurring questions should be resolved by this Court. Resolution of this split, we submit, requires a reversal of the First Circuit's decision in view of the express legislative intent of the Fees Act; this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980); appellate precedent; and the legislative intent of the fee provision in the Rehabilitation Act.

I. The First Circuit's Decision -- Denying Attorneys Fees in a Case in Which Plaintiffs Presented Substantial Constitutional Claims Which Were Not Addressed in View of the Dispositive Statutory Claim Upon Which Plaintiffs Prevailed -- Is Contrary to the Legislative History of the Civil Rights Attorney's Fees Awards Act, Contrary to the Decisions of This Court, and Contrary to the Courts of Appeals' Decisions on this Issue

There is no question here that petitioners obtained a preliminary injunction on their due process claim, A. 3, 28, 33, or that petitioners' equal protection claim was substantial, A. 43. Nor is there any dispute that all of petitioners' claims arose from a common nucleus of operative fact, for, as the First Circuit found: "The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to [petitioner Tommy Smith] because of his handicap, are factually identical to the EAHCA claims." A. 15. In fact, it is because of this factual premise that the First Circuit denied all fees: "We hold only that where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, section 1988 does not apply." A. 17.

Given the substantiality of petitioners' constitutional claims arising from the same common nucleus of operative fact as petitioners'

non-fee claim, the First Circuit erred in holding fees unavailable to petitioners under the Fees Act.

A. In Enacting the Fees Act, Congress Directed That Attorneys Fees Are to be Awarded in a Case Such as This Where Plaintiffs Allege a Substantial Constitutional Claim but Prevail on a Dispositive Statutory Claim Arising From a Common Nucleus of Operative Fact

The extensive legislative history set forth in the House and Senate Reports accompanying the Fees Act is quite familiar to this Court, and in fact has repeatedly been found to be dispositive of fee issues before this Court. See, e.g., Maher v. Gagne, 448 U.S. 122 (1980); New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980); Hutto v. Finney, 437 U.S. 678 (1978); see also, Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam summary reversal).

The legislative history is similarly dispositive here. In the House Report, Congress expressly recognized that fees are to be made

available to plaintiffs who prevail on a non-fee statutory claim so long as plaintiffs alleged a substantial constitutional claim arising from a common nucleus of operative fact:

> In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v. Lavine, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see Hagans v. Lavine, supra; United Mine Workers v. Gibbs, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' United Mine Workers v. Gibbs, supra, at 725.

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 n.7 (1976).

The foregoing legislative history, which was not cited or even alluded to by the First Circuit below, compels a summary reversal of the First Circuit's decision.

B. This Court's Decision in Maher v. Gagne, 448 U.S. 122 (1980), Which Addressed a Virtually Identical Issue, Compels Reversal Of the First Circuit's Decision

The conclusive legislative history cited above was quoted with approval and held to be dispositive by the Court in Maher v. Gagne, 488 U.S. 122 (1980). In fact, it was dispositive in two respects. First, this Court held that even if plaintiff's success in Maher had been based only on her Social Security Act claim, she still would have been entitled to fees under the Fees Act because she had alleged due process and equal protection claims which were found to have been substantial but were not addressed by the lower courts. 448 U.S. at 128 n.10.[3/]

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3. This was an alternative holding in Maher since the Court also recognized, 448 U.S. at 128-29, that plaintiffs' Social Security Act claim was a law within the meaning of the "and laws" language of § 1983 in view of Maine v. Thiboutot, 448 U.S. 1 (1980). Although petitioners here have never asserted a Maine v. Thiboutot theory in this case with regard to their claim under the Education for All Handicapped Children Act, the First Circuit in this case nonethe-

[footnote continued on following page]

Second, this Court in Maher rejected defendant's Eleventh Amendment defense by relying on the foregoing legislative history to hold that Congress had acted within its enforcement power when it authorized fees for plaintiffs who prevail on non-fee statutory claims:

> [C]learly Congress was not limited to awarding fees only when a constitutional or civil rights claim is actually decided. We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or

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[footnote continued from previous page]

less held that Middlesex County Sewage Auth. v. Sea Clammers Ass'n, 453 U.S. 1 (1981), provided support for a denial of fees since the Education for All Handicapped Children Act created a comprehensive remedial scheme which arguably cannot be asserted through § 1983. A. 13-17. The Maine v. Thiboutot and Sea Clammers issues, however, are not presented in this case in view of petitioners' substantial constitutional claims, and accordingly are not relevant under this Court's decision in Maher v. Gagne, 448 U.S. 122, 128 (1980). As the Eighth Circuit recognized in circumstances identical to those here, "even if EAHCA cannot be the basis for a § 1983 claim, it does not follow that plaintiff is entitled to no fee award in this case." Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982).

> in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.[15]

448 U.S. at 132. In the accompanying footnote 15, the Court first stated that the "legislative history makes it clear that Congress intended fees to be awarded where a . . . constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the [Fees] Act," and thereafter quoted the relevant legislative history from the House Report in full. 448 U.S. at 132 n.15.

This Court's decision in Maher, which was not at all analyzed by the First Circuit below, compels a summary reversal of the First Circuit's decision.

C. Courts of Appeals Which Have Addressed the Precise Issue Presented Here Have Rendered Decisions Diametrically Opposite to the Decision of the First Circuit

In view of this Court's decision in Maher, and particularly in view of the legislative

history of the Fees Act, it is not at all surprising that the courts of appeals have routinely held plaintiffs entitled to fees under the Fees Act where plaintiffs asserted a substantial constitutional claim but prevailed on non-fee statutory claims.[4/]

Applying this settled principle of law, the courts of appeals have also held plaintiffs entitled to fees under the Fees Act where plaintiffs alleged a substantial constitutional claim but prevailed on a non-fee statutory claim under the Education for All Handicapped Children Act. Monahan v. Nebraska, 687 F.2d 1164, 1172 (8th Cir. 1982) ("It does not matter that the constitutional, or § 1983, ground was not actually reached, and that the

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4. See, e.g., Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1124-25 (9th Cir. 1981) (successful claim under the Federal Aid for Highways Act coupled with unaddressed due process and equal protection claims); Oldham v. Ehrlich, 617 F.2d 163, 166-68 (8th Cir. 1980) (Social Security Act claim coupled with unaddressed equal protection claim); Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978) (successful claim under the Social Security Act coupled with unaddressed Fourteenth Amendment claim); cf., Doe v. Marshall, 622 F.2d 118, 119-20 (5th Cir. 1980) (successful claim under the Rehabilitation Act prior to the 1978 amendment authorizing fees).

complainant prevailed, to the extent that he did at all, on his EAHCA ground. Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the plaintiff prevails with respect to his non-fee claim, thus making it unnecessary for the Court to reach the § 1983 claim, an award of fees is nevertheless appropriate."); Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982) ("Here, the complaint contained non-frivolous claims under § 1983 based on the Fourteenth Amendment as well as on EAHCA. . . . In this situation, attorney's fees are awardable to plaintiff, even though the case had been decided on grounds for which an award of fees is normally improper."); Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982) ("Jurisdiction was properly predicated on allegations of the state's failure to meet statutory and constitutional obligations, and attorneys' fees may be awarded in cases where the prevailing claims are based only on violations of federal

statutes."); cf., Hastings v. Maine-Endwell Central School Dist., 676 F.2d 893, 897 (2d Cir. 1982) (defendants' EAHCA argument that fees should not have been awarded was "baseless" in view of plaintiffs' due process claim).[5/]

Only one court of appeals' decision provides any support for the First Circuit's conclusion here. In Hymes v. Harnett Bd. of Educ., 664 F.2d 410 (4th Cir. 1981), the Fourth Circuit denied fees to a prevailing plaintiff under the EAHCA essentially because, in its view, the EAHCA with its extensive remedial provisions did not fall within the "and laws"

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5. Numerous district courts have similarly held that plaintiffs who prevail under the EAHCA are entitled to fees so long as they alleged substantial constitutional claims. See, e.g., Gary B. v. Cronin, 542 F. Supp. 102, 120-21 (N.D. Ill. 1982); Turillo v. Tyson, 535 F. Supp. 577, 581-82 (D.R.I. 1982); Dep't of Educ. v. Katherine D., 531 F. Supp. 517, 531-32 (D. Hawaii 1982); Dep't of Educ. v. Valenzuela, 524 F. Supp. 261, 264 (D. Hawaii 1981); Mattie T. v. Holladay, 522 F. Supp. 72, 74 (N.D. Miss. 1981); New Mexico Ass'n for Retarded Citizens v. New Mexico, 495 F. Supp. 391, 399 (D.N.M. 1980); cf., Pastel v. Dist. of Columbia Bd. of Educ., 530 F. Supp. 660 (D.D.C. 1982) (citing numerous cases, and awarding fees under the Rehabilitation Act).

language of § 1983.[6/] At no time, however, did the Fourth Circuit recognize that plaintiff's assertion of a substantial and prevailing due process claim had independent legal consequences under § 1983 and § 1988 flowing from Congress' intent in enacting the Fees Act and flowing as well from this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980). Moreover, since the Fourth Circuit approved an award of fees for the time expended by plaintiff on the due process claim, Hymes, 664 F.2d at 411 n.1, 413 n.4, the Fourth Circuit's fee denial for time spent by the prevailing plaintiff on the successful EAHCA claim arising from the same set of facts places its

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6. In cases where plaintiffs do not allege independent constitutional claims under § 1983, it may be correct in view of Thiboutot and Sea Clammers that § 1983 cannot be invoked solely by alleging a claim under the EAHCA. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981). Petitioners here, however, have never argued that the EAHCA was within the "and laws" language of § 1983. See supra at 13-14 n.3. Instead, petitioners here, like the plaintiffs in the court of appeals' decisions (Monahan, Robert M., Jose P. and Hastings) cited supra at 16-18, and like the plaintiff in Maher v. Gagne, 448 U.S. 122 (1980), alleged independent constitutional violations through § 1983. See supra at 3-5.

decision in conflict with this Court's decision in Hensley v. Eckerhart, 51 U.S.L.W. 4552 (U.S. May 16, 1983).

The First Circuit's decision here, in other words, was rendered virtually without any legal support. The weight of authority in the courts of appeals counsels reversal of the First Circuit's decision.

II. The First Circuit's Decision Also Is Contrary to the Intent and Uniform Judicial Interpretation of the Fee Provision in the Rehabilitation Act

The First Circuit reversed the trial court's award of fees to petitioners under the Rehabilitation Act "for the same reasons" that it "reject[ed] an attorneys' fees award under section 1988." A. 19. With no analysis of the Rehabilitation Act's fee provision or of its legislative history, the First Circuit held that "the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act." A. 20.

This decision also is legally unsupportable. The earlier enacted 1975 Education for All Handicapped Children Act poses no barrier to an award of fees under the fee provision added to the Rehabilitation Act in 1978.[7/]

Not only does the fee provision in the Rehabilitation Act, 29 U.S.C. § 794a(b), contain language identical to that in the 1976 Fees Act, 42 § 1988,[8/] but the legislative history of the Rehabilitation Act's fee provision expressly incorporated the legislative

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7. The 1978 fee provision was contained in the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120, 92 Stat. 2955, 2982, which amended the Rehabilitation Act of 1973 by adding § 505(b) authorizing fees. The fee provision was reported favorably in the Senate Report, the House Report, and the Conference Report. It was explained in considerable detail on the floor of the Senate, see infra at 22-23 n.9.

8. Both statutes provide: "In any action or proceeding to enforce [the applicable statutes], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b); 42 U.S.C. § 1988. See supra at 2.

history of the 1976 Fees Act.[9/] The legal conclusions which flow from this congressional intent are twofold.

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9. Senator Cranston, the author of the fee provision which was enacted as 29 U.S.C. § 794a(b), fully explained the coverage and effect of this fee authorization in his remarks on the floor of the Senate:

> Mr. President, an amendment which I have authored, contained in section 505(b) of the reported bill, provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United States, and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (Public Law 94-559).
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> * * *
>
> Mr. President, I emphasize that it is intended that interpretation of the attorney's fee provision in the committee bill be analagous to interpretations of the Civil Rights Attorney's Fees Act of 1976, Public Law 94-556. The legislative history and expressions of legislative intent with respect to Public Law 94-556 are applicable to the new section 505(b).

124 Cong. Rec. 30346 (1978). See also id. at 30347.

Subsequent to passage by the Senate and by the House and subsequent to the House-Senate Conference, see supra at 21 n.7, the fee provision was explained again on the floor of the Senate, this time by Senator Stafford, the ranking member of the Subcommittee on the Handicapped. Senator Stafford initially observed that "section 505(b) of the conference bill provides for the allowance of attorneys' fees by a court as part of the costs to the prevailing party, other than the United

[footnote continued on next page]

First, by incorporating the legislative history of the 1976 Fees Act, Congress in effect reemphasized that plaintiffs who prevail on a non-fee claim such as a claim under the EAHCA are eligible for fees so long as they alleged a substantial constitutional claim arising from a common nucleus of operative fact. See supra at 9-18. Petitioners accordingly were entitled to fees on the same ground both under the Fees Act of 1976 and under the Rehabilitation Act as amended in 1978, see generally, Jose P. v. Ambach, 669

[footnote continued from previous page]

States and parallels the Civil Rights Attorneys' Fees Awards Act of 1976 (P.L. 94-559)." 124 Cong. Rec. 37507 (1978). He then stated: "I emphasize that it is intended that interpretation of the attorney's fees provision in the conference bill be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976; Public Law 94-556. The legislative history and expressions of legislative history and expressions of legislative intent with respect to Public Law 94-556 are applicable to the new section 505(b)." Id. at 37508.

The legislative history of the Fees Act accordingly is fully applicable to fee awards under the Rehabilitation Act. This is also true because of the fact that the Fees Act "is legislation similar in purpose and design to [the Rehabilitation Act's] fee provision." New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980).

F.2d 865, 871 n.4 (2d Cir. 1982); cf., Tatro v. Texas, 703 F.2d 823, 831-33 (5th Cir. 1983).

Second, just as "[n]othing in the language of § 1988 conditions the District Court's power to award fees . . . on a judicial determination that plaintiff's rights have been violated," Maher v. Gagne, 448 U.S. 122, 129 (1980), plaintiffs who prevail without winning any judicial ruling on their Rehabilitation Act claim nevertheless are entitled to fees under the Rehabilitation Act's fee provision, Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881 (4th Cir. 1982); Pratt v. Bd. of Educ. of Frederick County, 674 F.2d 259 (4th Cir. 1982); United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980).

Petitioners here, who alleged a substantial Rehabilitation Act claim which was not addressed by the trial court, were eligible for and entitled to fees under the Rehabilitation Act's fee provision, 29 U.S.C. § 794a(b).

CONCLUSION

The First Circuit's decision in this case is contrary to the express congressional intent of two federal statutes, contrary to this Court's decision in Maher v. Gagne, 448 U.S. 122 (1980), and contrary to all relevant courts of appeals' decisions.

Petitioners request this Court to issue a writ of certiorari to the U.S. Court of Appeals for the First Circuit, and to summarily reverse the First Circuit's decision or to set this case for plenary review.

Dated: June 23, 1983

Respectfully submitted,

E. RICHARD LARSON*
BURT NEUBORNE
American Civil Liberties
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Of Counsel

APPENDICES

APPENDIX A

THOMAS F. SMITH, JR., et al.,

Plaintiffs, Appellees,

v.

CUMBERLAND SCHOOL COMMITTEE,

et al., Defendants, Appellants.

No. 82-1524.

United States Court of Appeals,
First Circuit.

Argued Jan. 3, 1983.

Decided March 24, 1983.

Before ALDRICH, CAMPBELL and BREYER, Circuit Judges.

LEVIN H. CAMPBELL, Circuit Judge.

This is an appeal from an award of attorneys' fees in an action brought to secure a free appropriate public education for a handicapped child. Plaintiff Thomas F. Smith, III

is a handicapped child suffering from cerebral palsy and a variety of physical and emotional handicaps. Since December 1974 he has been enrolled in the Day Hospital Program at Emma Pendelton Bradley Hospital, which all parties agree provides him with an appropriate education. The Cumberland School Committee, Thomas's local education agency, 20 U.S.C. § 1401(8), partially funded his tuition at Bradley for one year. In November 1976, however, the school committee informed Thomas's parents, who are also plaintiffs in this action, that it would cease paying for Thomas's tuition because it believed that the Rhode Lsland Department of Mental Health, Retardation and Hospitals (MHRH) was the agency responsible for financing Thomas's education.

On November 26, 1976 plaintiffs commenced the present action in the United States District Court for the District of Rhode Island. The complaint as amended charged the Cumberland School Committee with violating the fourteenth

amendment to the Constitution, the Education for All Handicapped Children Act (EAHCA), 20 U.S.C. §§ 1401 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. § 794, by denying Thomas a free appropriate education, discriminating against him because he was emotionally disturbed, and refusing to grant him an impartial hearing prior to the termination of tuition payments.[1] On December 22, 1976 the district court issued a preliminary injunction requiring the school committee to maintain Thomas at Bradley while plaintiffs exhausted their administrative remedies. On January 20, 1977 a hearing was held before the school committee. The school committee affirmed its prior decision. The plaintiffs then appealed to the Rhode Island

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1. The original complaint only charged that the school committee violated the Constitution by refusing to fund Thomas's education at Bradley pending administrative review of the committee's decision. In May 1978 the complaint was amended to include claims under the newly effective EAHCA, 20 U.S.C. § 1415. On September 16, 1980 the complaint was again amended to include claims under the Rehabilitation Act and the equal protection clause of the Constitution.

Commissioner of Education, one of the appellants here. The Associate Commissioner of Education, the other appellant here, scheduled a hearing for November 2, 1977. The plaintiffs then moved that the Associate Commissioner recuse himself and provide an impartial hearing officer. This motion was denied. Following the hearing, the Associate Commissioner affirmed the school committee's decision. Plaintiffs then amended their complaint to name the Commissioner and Associate Commissioner as defendants.

On December 22, 1978 the district court decided that the controversy before it might be solved by a determination as to which agency was responsible under Rhode Island law for Thomas's education. Accordingly it certified this issue to the Rhode Island Supreme Court,[2] which ruled that the school committee,

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2. Two questions were certified concerning the construction and interaction of R.I.Gen.Laws §§ 16-24-1; 16-25-2 and 40.1-7-1--40.1-7-9.

and not the MHRH, was responsible under state law for paying for Thomas's education. Smith v. Cumberland School Committee, R.I., 415 A.2d 168 (1980). The Rhode Island Supreme Court stated that a contrary result risked placing the state's law in conflict with the federal EAHCA.

After the Rhode Island Supreme Court rendered its decision, the district court found that plaintiffs won all they sought under state law and granted a permanent injunction. Federal statutory and constitutional issues were not reached. We affirmed the district court's judgment in an unpublished decision.

Plaintiffs then sought attorneys' fees. An agreement was reached with the school committee whereby the committee paid $8,000 in attorneys' fees for the costs plaintiffs incurred in securing the preliminary injunction and arguing before the school committee. The district court decided the question of attorneys' fees with regard to the other defendants.

The district court, relying on its decision in Turillo v. Tyson, 535 F.Supp. 577 (D.R.I.1982), found that plaintiffs were entitled to fees under 42 U.S.C. § 1988 because they had stated constitutional section 1983 claims, and under 29 U.S.C. § 794a(b) because they had alleged violation of the Rehabilitation Act. The district court further reasoned that because the plaintiffs were required by the EAHCA to exhaust their administrative remedies, and because the district court refused to hear the federal claims before the state claims were decided by the Rhode Island Supreme Court, the plaintiffs were entitled to attorneys' fees for all of the work done before the state agencies and the state court. See New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980); Bartholomew v. Watson, 665 F.2d 910 (9th Cir.1982). Fees of $32,109 were awarded. It is from this judgment that the Commissioner and Associate Commissioner appeal.

Appellants raise three issues on appeal. First, they argue that neither section 1988 nor section 794a(b) provide for fees in this case because it was essentially brought under the EAHCA which does not provide for attorneys' fees. Second, they argue that even if fees are available, the district court should not have compensated plaintiffs for the attorneys' work before the state agencies and state court. Third, they argue that the district court erred in accepting an attorney's affidavit rather than original time sheets as evidence of the hours the attorney spent on the case. Because we decide that attorneys' fees are not available here at all, we only discuss that issue.

A. Section 1988

Under what is labelled the American Rule, attorneys' fees are only available as a general matter when statutory authority so provides. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct.

1612, 44 L.Ed.2d 141 (1975). Since the narrow exceptions under the American Rule are not applicable here, our task is to determine whether or not there is statutory authority for awarding attorneys' fees in the present case.

This action and the relief granted fall within the parameters of EAHCA, a federal statute which establishes a comprehensive federal-state scheme for the provision of special education to handicapped children. The complaint alleged that the school committee's refusal to fund Thomas's placement at Bradley denied him a free appropriate public education as defined by the EAHCA. 20 U.S.C. § 1401(18). The complaint also claimed that the hearings provided by the Rhode Island officials did not comply with certain due process provisions imposed by the EAHCA upon participating states because they were not impartial. 20 U.S.C. § 1415(c). And ultimately it was to the EAHCA that the

Rhode Island Supreme Court looked in determining that state law required the school committee to fund Thomas's placement at Bradley. R.I. 415 A.2d at 172. Not only was EAHCA the foundation of plaintiffs' victory, its provisions encompassed all the relief for which plaintiffs now seek attorneys' fees, i.e., all relief beyond the preliminary injunction. See footnote 3, infra.

Yet while EAHCA provides expressly for the bringing of private enforcement actions such as this one, 20 U.S.C. § 1415(e), it contains no provision for attorneys' fees. Hymes v. Harnett County Board of Education, 664 F.2d 410 (4th Cir. 1982). For authority to award fees in the instant case, the district court had to turn to other statutes, primarily to 42 U.S.C. § 1988 which authorizes courts to award attorneys' fees to prevailing parties in actions brought under 42 U.S.C. § 1983. In so doing, the district court relied upon authorities holding that fees may be awarded under

section 1988 when the claim upon which the plaintiff actually prevailed was accompanied by a "substantial," though undecided, section 1983 claim arising from the same nucleus of facts. Lund v. Affleck, 587 F.2d 75, 77 (1st Cir.1978). See, e.g., Luria Bros. & Co., Inc. v. Allen, 672 F.2d 347, 357 (3d Cir.1982); Southeast Legal Defense Group v. Adams, 657 F.2d 1118 (9th Cir.1981). Here, plaintiffs' section 1983 claims were arguably "substantial" in that, though weak, they would at least have supported federal jurisdiction. See Maher v. Gagne, 448 U.S. 122, 127, 100 S.Ct. 2570, 2573, 65 L.Ed.2d 653 (1980), citing Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Prior to enactment of EAHCA in 1975, one district court had held that the equal protection clause of the Constitution required school districts to provide special education to handicapped children. See Mills v. Board of Education, 348 F.Supp. 866 (D.D.C.1972). And the Eighth Circuit has held that due pro-

cess claims akin to plaintiffs' were sufficiently colorable to sustain a fees award under section 1988. Robert M. v. Benton, 671 F.2d 1104, 1106 (8th Cir. 1982).

But even if plaintiffs' section 1983 claims qualify as "substantial," we do not think that fact alone created authority for fees in a case bottomed so completely on an encompassing federal statute that does not authorize fees. Alyeska makes clear that it is for Congress, not the courts, to pick and choose among types of actions warranting fees. 421 U.S. at 269, 95 S.Ct. at 1627. Thus the question before us remains one of finding affirmative congressional sanction for fees in this situation. We can find none. The federal statute under which relief was obtained here is a far-reaching statutory and administrative scheme for the provision of free appropriate public education for handicapped children. 20 U.S.C. §§ 1401 et seq. While the creating and processing of educational programs for handi-

capped children is left to the states and to state law, the federal Act imposes substantial requirements and standards on the states. The Act not only creates substantive rights for handicapped children, but it also establishes detailed remedial procedures, including provisions for state administrative due process hearings and, as noted, private lawsuits in the federal and state courts to be brought by persons disatisfied with state and local plans for educating handicapped children. Given the Act's comprehensiveness, we do not see how the singular omission of any provision for attorneys' fees can be rectified by recourse to section 1988. See Hymes v. Harnett County Board of Education, 664 F.2d 410 (4th Cir.1981); Anderson v. Thompson, 658 F.2d 1205 (7th Cir.1981); Noe v. Ambach, 542 F.Supp. 70 (S.D.N.Y.1982); Tatro v. Texas, 516 F.Supp. 968 (N.D.Tex.1981). But see Monahan v. Nebraska, 687 F.2d 1164 (8th Cir. 1982); Hastings v. Maine-Endwell School District, 676 F.2d 893 (2d Cir.

1982); Robert M. v. Benton, 671 F.2d 1104; Jose P. v. Ambach, 669 F.2d 865 (2d Cir.1982); Gary B. v. Cronin, 542 F.Supp. 102, 121 (N.D.Ill.1982); Department of Education v. Katherine D., 531 F.Supp. 517 (D. Hawaii 1982).

Support for our view is found in the Supreme Court's recent discussion of section 1983 in Middlesex County Sewage Authority v. Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). The Court there considered whether section 1983 created an action for violation of a federal statute when the statute itself was part of an act containing comprehensive remedial measures but no private right of action. The Court stated that "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to preclude the remedy of suits under § 1983." Id. at 20, 101 S.Ct. at 2626. Middlesex County may not logically preclude a section 1983 action

for violation of the EAHCA; because the EAHCA expressly recognizes a private right of action, rather than denying one as did the federal pollution statutes in Middlesex County, the inference is weaker that Congress intended to preclude suit altogether under section 1983. However, Middlesex County does support the more general proposition that when a statute creates a comprehensive remedial scheme, intentional "omissions" from that scheme should not be supplanted by the remedial apparatus of section 1983. Here, the EAHCA provides an express private right of action, but it omits entirely any provision for attorneys' fees. This omission is just as significant a part of the remedial scheme of the EAHCA as was the lack of a private right of action under the pollution statutes in Middlesex County, and the omission has the same preclusive effect with regard to section 1988 that the lack of a private remedy in Middlesex County had with regard

to section 1983.

This principle precludes section 1988 fees for the constitutional claims at issue here. The fact that the section 1983 claims alleged here are based upon independent constitutional violations rather than violations of the EAHCA itself is immaterial. The constitutional claims alleged here, a denial of due process and a denial of a free appropriate public education to Thomas because of his handicap, are factually identical to the EAHCA claims. Indeed, in enacting the EAHCA Congress sought to ensure that handicapped children receive the very "rights" that plaintiffs claimed were constitutional under section 1983. See S.Rep. No. 168, 94th Cong., 1st Sess. 6-7, reprinted in 1975 U.S.Code Cong. & Ad.News 1425, 1430-31 (legislation said to be designed to enable states to fulfill their constitutional obligations to handicapped children). Thus, the only difference between the statutory and consti-

tutional claims is that the former carries with it a far more favorable legal standard for the plaintiffs and enabled them to prevail on what would otherwise have been fairly questionable claims. Because Congress, in providing statutory remedies for the same factual complaints, did not authorize attorneys' fees for such actions, we do not believe that section 1988 is a sufficient basis for the granting of attorneys' fees here. Plaintiffs' mere recitation of a section 1983 claim cannot create a right to attorneys' fees in litigation as to which Congress, perhaps recognizing the shortness of school funds, has not seen fit to make a special award. Cf. Scruggs v. Campbell, 630 F.2d 237 (4th Cir. 1980) (plaintiffs cannot evade EAHCA's exhaustion requirements merely by reciting section 1983 in their complaint). If this were not so, attorneys' fees would become available in almost every case by the mere incantation of section 1983. See

Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Statutory Grounds, 130 U.Pa.L.Rev. 488, 518 (1981).

This is not to say that the EAHCA in any way limits the substantive scope of a handicapped child's constitutional rights. Should a handicapped child have a constitutional claim that is not provided for by the EAHCA, section 1983 and therefore section 1988 might be available.[3] We hold only that where, as here, the constitutional allegations arise from the same factual underpinnings as the statutory claims, section 1988 does not apply.

B. The Rehabilitation Act

This district court also found that attor-

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3. To the extent plaintiffs' securing of a preliminary injunction fell outside any relief available under EAHCA, the attorneys' fees relative thereto might be reimbursable on such a theory. See Hymes v. Harnett County Board of Education, 664 F.2d at 410. We need not decide this question, however, because plaintiffs received attorneys' fees from the Cumberland School Committee for the work done obtaining the preliminary injunction, and those fees are not on appeal.

neys' fees were available under section 505 of the Rehabilitation Act, 29 U.S.C. § 794a(b). As with section 1988, attorneys' fees are available under section 794a(b) whenever a party presents a substantial section 504 claim even if they do not ultimately prevail under that claim. United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir.1980). The question before us, therefore, is whether section 504 created a substantial claim in this case.

The existence of any private action under section 504 is in doubt. Several circuits have implied such a right, e.g., United Handicapped Federation v. Andre, 622 F.2d 342; Coleman v. Darden, 595 F.2d 533, 538 (10th Cir.) cert. denied, 444 U.S. 927, 100 S.Ct.267, 62 L.Ed.2d 184 (1979); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir.1977), but recent Supreme Court dicta suggests otherwise. Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 27, 101 S.Ct. 1531, 1545, 67 L.Ed.2d

694 (1981). We need not resolve the question, however. Even if there is generally a private right of action under section 504, we hold that attorneys' fees are unavailable here under the accompanying fees provision. 29 U.S.C. § 794a(b).

We reach this conclusion for substantially the same reasons that we reject an attorneys' fees award under section 1988. Section 504 of the Rehabilitation Act is a general prohibition of discrimination against otherwise qualified handicapped individuals in federally funded programs.[4] It does not

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4. Section 504 states:

No other qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation,

[footnote continued on next page]

specifically apply to the education of handicapped children.[5] The EAHCA, in contrast, is a comprehensive act specifically providing substantive and procedural rights for handicapped children denied an appropirate public education. While the more specific rights created by the EAHCA may not indicate a congressional intent to preclude "overlapping" actions under section 504, the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act. See page 8, supra. This result is particularly appropriate where the very

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[footnote continued from previous page]

Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

5. Regulations promulgated under section 504 by the Secretary of Education require school boards to provide handicapped children with a free appropriate public education. 34 C.F.R. 104.34. Compliance with the EAHCA is deemed to satisfy the Rehabilitation Act regulation.

existence of a private right of action under section 504 is the subject of doubt. But see Department of Education v. Katherine D., 531 F.Supp. 517; Mattie T. v. Holladay, 522 F.Supp. 72 (N.D.Miss.1981); Campbell v. Talladega County Board of Education, 518 F.Supp. 47 (N.D.Ala.1981); Tatro v. Texas, 516 F.Supp. 968.

Reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et als	:	
	:	
-vs-	:	C.A. NO. 76-0510
	:	
CUMBERLAND SCHOOL COMMITTEE, et als	:	

O R D E R

This matter came before the Court on Plaintiffs' Motion For An Award Of Fees And Other Costs. After hearing on April 30, 1982, based upon the Court's oral decision, as modified by order of June 5, 1982,

IT IS HEREBY FURTHER ORDERED;

1. Said motion shall be and hereby is granted.

2. The defendants, Rhode Island Commissioner and Associate Rhode Island Commissioner of Education, shall pay to plaintiffs' counsel, George M. Prescott, Esquire a fee of $32,109.00, plus costs of $293.93.

By Order: /s/
Deputy Clerk

Enter: /s/ Raymond J. Pettine
Chief Judge

June 11, 1982

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et al.	)	
	)	
v.	)	Civil Action
	)	No. 76-0510 P
CUMBERLAND SCHOOL COMMITTEE, et al.	)	

ORDER

On April 30, 1982 following the presentation of evidence, the Court rendered an extemporaneous oral decision in the above-captioned case. This decision was conditioned on counsel ordering a transcript and correcting errors I might have made as to the computation of costs, attorneys' fees, and/or the travel of the case. Counsel have complied as evidenced by the letter and transcript attached hereto and made a part hereof.

In keeping with the corrections mutually agreed upon by the parties, it is hereby ordered that the decision be amended accordingly. In the interest of having a single document

clearly setting forth the ruling of the Court, counsel will prepare a final order for entry by the Court.

By Order,

/s/
Deputy Clerk

Enter:

/s/ Raymond J. Pettine
Chief Judge

June 5, 1982

LAW OFFICES
OSTER, GROFF & PRESCOTT
936 SMITHFIELD AVENUE
LINCOLN, RHODE ISLAND
02865

May 26, 1982

Chief District Judge
Raymond J. Pettine
Chambers
Room 209
Federal Building
United States Courthouse
Providence, Rhode Island 02903

Re: Thomas F. Smith, Jr., et als, vs.
Cumberland School Committee, et als
US District Court
C.A. #76-0510

Dear Judge Pettine:

Forrest Avila, Esquire, counsel for the R.I. Commissioner and Associate R.I. Commissioner of Education ("the state party defendants") and I have conferred regarding the transcript of your decision on plaintiffs' motion to tax costs, including attorneys' fees.

We agree the decision should be modified as follows:

1. The court omitted to tax costs, other than counsel fees, pursuant to 28 USC § 1920. The correct amount of these costs, as set forth in the affidavit attached to plaintiffs' motion is $293.93.

2. The court erroneously deducted 11.5 hours. (See page 16 of the transcript). These hours are included in the 114

hours already deducted as having been compensated for by the defendant school committee.

3. There are some inaccuracies in the court's decision regarding the travel of the case. Mr. Avila and I agree the statement enclosed herewith is an accurate statement of the travel of the case.

The court should modify its award against the state party defendants to add;

1. $293.93 in taxable costs, pursuant to 28 USC § 1920.

2. $885.50 compensation for the 11.5 hours erroneously omitted ($70.00 per hour plus 10% incentive award).

Therefore, the award should be;

$31,223.50	(Transcript Page 17)
885.50	(Omitted hours)
293.93	(Taxable costs)
$32,402.93	Total

Very truly yours,
OSTER, GROFF & PRESCOTT

/s/
GEORGE M. PRESCOTT

c.c. Forest Avila, Esquire

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et als	:	
	:	
-vs-	:	C.A. #76-0510
	:	
CUMBERLAND SCHOOL COMMITTEE, et als	:	

TRAVEL OF CASE

Plaintiffs filed this civil action against the defendant school committee on November 26, 1976. The court issued a temporary restraining order requiring the defendant school committee to maintain the minor plaintiff in an educational program at Emma Pendleton Bradley Hospital, in East Providence. This order was continued on December 22, 1976 by a preliminary injunction. The minor plaintiff's interests were thereby protected by the court pending exhaustion of state administrative remedies.

An administrative hearing was held before the defendant school committee on January 20, 1977. From an adverse decision by the school committee the plaintiffs appealed to the defendant, Rhode Island Commissioner of Education.

An administrative hearing was held before the defendant, Associate Rhode Island Commissioner of Education on November 2, 21 and December 21, 1977.

On April 27, 1978 plaintiffs moved the court to amend their complaint to add the Rhode Island Commissioner and Associate Rhode Island Commissioner of Education as parties defendant. Their motion was granted on May 9, 1978 and these new defendants were served with an amended complaint.

This court certified two (2) questions of law to the Rhode Island Supreme Court on January 16, 1979. The state Supreme Court answered these questions in a written opinion dated June 3, 1980. Plaintiffs on June 9, 1980 again move the court to amend their complaint. The motion was granted on June 24, 1981 and all defendants were then served with a second amended complaint.

A declaratory judgment was entered by the court on June 4, 1981. From this judgment

the state defendants appealed to the First Circuit Court of Appeals. Their appeal was denied on January 11, 1982.

Pending the appeal plaintiffs' counsel's motion for taxation of costs, including attorneys' fees was staid.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

THOMAS F. SMITH, JR., et al	)	
	)	
v.	)	C.A. No. 76-0510
	)	
CUMBERLAND SCHOOL COMMITTEE, et als	)	

Transcript of Court's Decision in the above captioned case on Friday, April 30, 1982.

APPEARANCES:

GEORGE M. PRESCOTT, Esquire.....FOR THE PLAINTIFFS

FORREST L. AVILA, Esquire
Department of Education
State of Rhode Island.....FOR THE DEFENDANTS

[2]

FRIDAY, APRIL 30, 1982

(Court convened 3:15 p.m.)

OPINION

THE COURT: Gentlemen, I don't know whether I like this idea of being under the

pressure of getting an opinion out in two and a half hours but I did finish this one. I just feel required to do this because of the number of these that I have and how they pile up. In advance I apologize for any poor construction, it was done as you know in a matter of a couple of hours and I don't know whether my calculations are that accurate, if so we can go over them together right here in the courtroom. At any rate, as I see the case it's as follows: Smith v. Cumberland School Committee, 76-0510.

As I stated in my memorandum and order, Smith v. Cumberland School Committee, Civil Action 76-0510, dated June 3, 1981, the facts of this "seemingly interminable case have been set out in prior opinions of this court, See opinion issued December 22, 1978 and the Supreme Court of Rhode Island, R.I., 415 Atlantic 2d 168 (1980), they need not be repeated here."

A sketchy skeletal outline of the travel of this case starts with a suit brought in this court seeking an injunction prohibiting the

Rhode Island Commissioner of Education from hearing administrative appeals under 20 United

[3]

States Code, Section 1415(c) and a declaration that the local School Committee, not the State Department of Mental Health, was responsible for paying for the special education of the handicapped plaintiff child under state law.

On January 17, 1977, I issued a preliminary injunction directing that the plaintiff child be maintained in a day program at Emma Pendleton Bradley Hospital at defendant's expense and that the plaintiff exhaust his state administrative remedies.

On December 22, 1978, I certified certain state law questions to the Rhode Island Supreme Court and decided the federal law question in defendant's favor.

The procedural requirements of the various stages of hearings and appeals as set forth in 20 USC, Section 1415 were followed. The plaintiff's appeals were unsuccessful and

there was this ultimate suit in this court. There was a substantial predeterminate period before the state court rendered its opinion. The state court determined that the local school committee was responsible for plaintiff's special education, thus overturning a contrary administrative decision by the Commissioner, 415 Atlantic 2d, 168 (R.I. 180). As a matter of state law the plaintiff won all that he originally sought. The federal claims (violations of procedural process, equal protection claim under rehabilitation act and inconsistency of the state's

[4]

funding of handicapped children with the Federal Handicapped Act) became moot. See unpublished opinion 1st Circuit January 11, 1982, No. 81-1454 and 81-1499, Smith v. Cumberland School Committee.

The complaint in this action was brought under the Constitution and laws of the United States, more specifically, the due process and

equal protection clauses of the 14th Amendment to the Constitution of the United States, the Education of the Handicapped Act (20 USC, Section 1401 et seq.), and the Rehabilitation Act of 1973, Section 504 (29 USC, Section 794). Count 2 of the amended complaint reads: The School Committee has discriminated against Tommy because he has a particular handicapping condition, that is, emotional disturbance, whereas it has not discriminated against other children with different handicaps. Such discrimination violates the equal protection clause of Section 1 of the 14th Amendment to the United States Constitution and 29 U.S.C., Section 794.

The plaintiff now moves for an award of attorney's fees and costs, 42 United States Code, Section 1988. By agreement the Cumberland School Committee has already paid the plaintiff $8,000 for 114 hours at $70 an hour; these hours represent the time spent getting the injunction and the hearings before the

School Committee. It should be noted that the state defendants were not

[5]

parties when the complaint was first filed.

The defendants claim they are not liable for any fees; they raise a number of objections, namely, they object to affidavits being used in the trial of this hearing claiming instead that the time, original time slip sheet should produced, object to a fee award with reference to proceedings before the Commissioner of Education was named a party to this action and object to a fee award for any hours spent before the Commissioner in administrative hearing. They also object to hours for that part of the case challenging the use of employees as hearing officers. Further objections are as to hours spent in conferences or otherwise with the Cumberland School Committee. The defendants also contend that since Cumberland has already paid a fee the plaintiff should not be paid any further

fee but if the court sees fit to award one, the hours for which they have been paid should be deducted; and finally that no fee should be paid since this is a proceeding under the Education to All Handicapped Children's Act which does not permit such an award.

The first objection is without merit. The affidavits introduced were testified to by the plaintiff's attorney who prepared them as being verbatim accounts of the entries he made on his time sheet which he cannot now locate. In other words, the entries in the affidavit are

[6]

exact duplicates of the time sheet entries and are therefore admissible under the federal rules of evidence.

Objections 2 and 3 pertain to those hours spent in the state administrative process both before and after the State Commission of Education was named a party in this federal action.

I do not agree with the defendants. Exhaustion of state administrative proceedings was necessary before the plaintiffs could litigate their statutory and constitutional claims in this court.

As I said in Turillo v. Tyson, Civil Action 81-0356, slip opinion 3/29/82 at pages 9 and 13, plaintiffs were required to exhaust their Educational All Handicapped Children's Act remedies before bringing their Section 1983 action or claims under the Rehabilitation Act, Section 504.

Because these proceedings were necessary to their federal action and because the plaintiffs ultimately prevailed, this court finds fees are available against the state for these administrative proceedings.

Objection 4 I agree with the defendants, the plaintiff is not entitled to compensation for hours spent challenging use of employees as hearing officers. He has allocated 17 hours for this work.

Objections 5 and 6. These objections present no problem for fees for such work are not being claimed.

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Cumberland has paid $8,000 to the plaintiff for 114 hours which includes the time in objection 5.

Objection 7. The defendant claims no fee should be paid because this is an action pursuant to the Education of All Handicapped Children's Act.

The defendant, however, gives little significance to the plaintiff's allegation of discriminatory treatment in violation of the equal protection clause and the second amended complaint and of the 42 United States Code 1983 claim.

The reasoning set forth in my recent opinion of Turillo v. Tyson, supra, plainly controls this case, entitle plaintiff to fees for time spent in both administrative process and for the litigation before the Rhode Island

Supreme Court as to the question this court certified to it.

The court excerpts the pertinent portions of Turillo: "Because exhaustion of these EAHCA administrative remedies is essential if plaintiffs are to prevail on their constitutional claim, work done in connection with these proceedings is compensable under Section 1988. Support for this conclusion is provided by New York Gaslight Club v. Carey, 447 U.S. 54 (1980). The Carey Court held that attorney's fees are awardable for work done in connection with state administrative proceedings mandated by Title 7

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of the Civil Rights Act of 1964. The court reasons that because initial resort to state proceedings was required by the statute, 'only authorization of fee awards insures incorporation of state proceedures as a meaningful part of the Title 7 enforcement scheme.' Significantly, fees were awardable in connection with

'any action or proceeding under' Title 7. 42 USC, Section 2000e-5(k). The court concluded that Title 7 authorized a plaintiff to bring an action for attorney's fees even if she prevailed on all claims in the state administrative proceedings.

Recently, the Court of Appeals for the Ninth Circuit applied the Carey holding to the 1983 section. In Bartholomeu v. Watson, 65 F. 2d 910 (Ninth Cir. 1982), the court held that Section 1988 attorney's fees were awardable for work performed in state court on state law claims when the state court action was resorted to as a result of Pullman abstention. The EAHCA proceedings here are just as much a part of plaintiffs' Section 1983 claim as was the state court action a part of the Section 1983 in Bartholomeu. Research has produced only three decisions on whether work performed in connection with EAHCA administrative hearings is compensable under Section 1988. All three courts awarded fees.

Department of Education v. Katherine D., Civil Action No. 80-0582 (D. Hawaii Jan. 28, 1982); Patsel v. District of Columbia Board of Education, C.A. No. 81-2126

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(D. D.C. Jan. 21, 1982); Hilden v. Evans, 3 EHLR 552: 299 (D. Ore. 1980)." Turillo v. Tyson, supra, at 10 and 11. The Bartholomeu case, cited in the excerpt from Turillo, is squarely on point as to entitlement to fees for litigation of the question certified by this court; Bartholomeu involved abstention, which is conceptually similar to the certification of questions of state law.

Now, the hourly rate. I left a page downstairs, gentlemen, as to where I was to read, I'm going to have to go back and insert that page. That page goes where I said objection number 7, the defendant claims no fees should be paid because this is an action pursuant to the EAHCA. I then said the defendant, however, gives little significance to

the plaintiff's allegation of discriminatory treatment in violation of the equal protection claim and the second amended complaint and of the 42 United States Code, Section 1983 claim. I want to add there I find that the equal protection claim is colorable and non-frivolous. Be that as it may, enough has been said to establish that the plaintiffs have made a substantial constitutional claim even if that claim ultimately would not have prevailed. Plaintiffs are therefore entitled to attorney's fees to the extent they have prevailed in an action or proceeding to enforce their 1983 claim. 42 U.S.C. Section 1988. Plaintiffs are certainly entitled to fees for work performed

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in connection with the state administrative proceedings required by the EAHCA and in litigation before the Rhode Island Supreme Court. And I refer you to Turillo at page 9. Now to carry on from where I was: Hourly rate.

Counsel have left to the court the determination of a reasonable hourly rate. The plaintiff accepted $70 an hour from the Town of Cumberland. I see no reason why he should expect anything more here. I find this is a fair rate considering the nature of the case. It has been a long, hard, tortuous one; the issue was precedent setting and not the easiest to litigate. However, I must find a lodestar as I said in Kennelly v. Lemoi et al, C.A. No. 76-0784, November 20, 1981, "To further assist the trial courts, the First Circuit in Furtado v. Bishop, 635 F. 2d 915 (First Cir. 1980), adopted the approach developed by the Third Circuit in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F. 2d 102 (3rd Cir. 1976), more recently endorsed and applied in Copeland v. Marshall, No. 77-1351 (D.C. Cir. 1980) (en banc). See also Copper Liquor, Inc. v. Adolph Coors Co., 624 F. 2d 575, 583, note 15 (5th Cir. 1980). 'This approach recognizes that commenting on

the twelve factors identified in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir. 1974) setting out the factors adopted in Greenblatt, supra, may not in any real sense contribute to the rational setting of

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a fee; the comments are imprecise and the items overlap." Furtado v. Bishop, supra, at 920. However, Furtado does not abrogate the twelve factors in Greenblatt. Rather, it gives the trial judges the help that will assist them in honing the Greenblatt factors into "a useful analytical framework that can be applied by trial courts in all cases and can also lend itself to meaningful review...." Id. at 920. The succinct recitation by the First Circuit of this theory warrants that it be quoted in full rather than capsulized. It reads: "The starting point is to calculate the lodestar": "The number of hours reasonably expended multiplied by a reasonable hourly rate." This would involve separating out

work done in relation to a firm's hierarchy, from senior partner to junior associate (and, we would add, including work that was or ought to have been assigned to a non-lawyer); eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; and, after receiving documentation and possibly holding a hearing, assigning appropriately hourly rates for the kind of work done by those at different levels of expertise. This results in a lodestar fee that then is adjusted upward or downward to reflect the contingent nature of any fee (if such is not reflected in the hourly rate), delay in payment, quality of representation (i.e. an unusually good or poor performance above or below the skill already

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reflected in the hourly rates), exceptional (and unexpected) results obtained."

Furtado's two-part analysis preserves the twelve factors in Greenblatt, but puts

them in a logical framework and orderly sequence. Some of the Greenblatt criteria are relevant to determining the lodestar, the number of hours reasonably expended multiplied by a reasonable hourly rate. These criteria include, the time and labor required, the experience and ability of the attorney, the customary fee in the community, awards in similar cases, and the novelty and difficulty of the questions presented. Other criteria are relevant to adjusting the lodestar up or down, the second half of the Furtado analysis. These factors include: preclusion of other employment, whether the fee was fixed or contingent, time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the undesirability of the case, and the nature and length of the professional relationship.

Guided by the relevant Greenblatt criteria, the court will first determine the lodestar figure. Because plaintiff's counsel

was a one-man operation," and I say that that is virtually true in this case because Mr. Prescott testified that he alone worked on this case, "the language in Furtado ralating to a firm hierarchy is

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inapplicable here. Furthermore, it is undisputed that the time expended was consistent with a standard of reasonable efficiency and productivity. Therefore, Furtado does not require this court to eliminate any excessive hours spent.

The next inquiry in determining the lodestar is whether the questions presented were particularly novel or difficult." I think that they were. The issue determined set a precedent which prior thereto was uncertain. Resolution of the question involved, at the minimum, an interpretation of a convoluted state statutory scheme and its juxtaposition to the federal law. Although awards in similar cases would be an indictia

looked to as to a reasonable fee I have no such information here.

Another lodestar criterion, borrowed from Greenblatt, is skill required to perform the legal services properly. The issue is complicated and required more than average legal ability. Mr. Prescott performed his task well as is evidenced in part by the results he achieved.

The court must now complete the second half of the Furtado analysis by determining whether the lodestar rate should be adjusted up or down.

First, the Greenblatt criterion of preclusion of other employment can affect the lodestar rate only if the hours spent on the case inherently precluded counsel

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from representation of certain other clients. However, the hours expended in this case were not so unusual as to require special consideration. In this case there were no unusual or

significant time limitations.

Another Greenblatt factor that may require adjustment of the lodestar is the nature and length of the professional relationship with the client. However, I see nothing to be considered here.

The next relevant criterion is the amount involved and the results obtained. I have already commented on the results. As to the amount involved, that is not relevant to this case since no damages were sought.

The factor of undersirability of the case, however, does not have a favorable effect on the lodestar figure. There was no particular publicity engendering any great public reaction. If anything, there is public support for this kind of action.

Next I must consider whether the case was litigated on a fixed or contingent fee basis. This case was, with the exception of $400, a contingent fee case. As I stated in Palmigiano, supra, at 737, "Certainly the contingency factor

is cause for a more liberal application of the consideration guiding a court in awarding a fee; Congress intended, through the fees award act, to encourage civil rights litigation to vindicate important rights

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guaranteed by law."

In summary I have said that this was a difficult case requiring more than average skill; I also stated that the contingency factor weighs on the side of a more liberal award. In short I feel some modest upward adjustment should be made, I think 10 percent is fair.

The fee. This is a calculation which you better follow. I'd like to interrupt by saying here, gentlemen, that this opinion I'm going to, as I'm reading it, and it's strange you keep writing at top speed and then as you read it it sounds somewhat different, I mean the essence, the meaning, what I want to say is there but the essence of it isn't quite as

clear I think as it should have been, what I want to say to you is some long while ago I got the idea of from time to time issuing what is called a tentative opinion and submitting it to the parties so that they can look that opinion over and make any comments they want with reference to the facts before it's ultimately filed and so I'm going to label this as a tentative opinion and permit you to come in, and indeed invite from you your comments, corrections, modifications or shall I say the smoother flowing of the facts and history of this case and also any of the computations that I might make on this fee award, and I notice there's one page missing.

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(Pause)

Are you going to order a transcript of this?

MR. AVILA: Yes, Your Honor.

THE COURT: Are you, Mr. Prescott?

MR. PRESCOTT: I will, Your Honor.

THE COURT: All right, you've got an order from both of them and I'd like to have this as soon as you can.

All right, the computation, the fee. As I see it the total hours in the affidavit as I see it are 564.25 hours. From this we must deduct 114 hours paid by Cumberland. I am not entirely clear because there were certain hours disallowed, these hours that were disallowed amounted to 11.5 hours, that was 11/26/76, 12/14/76, 12/14/76, and 12/15/76. I don't know if these 114 hours include those hours or whether this 11.5 hours were in addition to the 114 hours and that you are seeking compensation for those also. This is why I say you better check this computation afterwards when you get this transcript so you can straighten me out on this.

Hours for work that could have been done by paralegals; I find that those total 35 hours, and I'll read those to you and you can check them later. 5/10/78-3.25, 10/7/78-2,

10/10/78-2.25 hours, 10/12/78-2, 10/16/78-1.50, 6/13/79-1.50, 6/9/80-1.50, 9/12/80-2, 9/16/80-2, 12/15/80-2 hours,

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2/25/81-2, 3/23/81-1.25, 4/23/81-.75, 5/19/81-2, 10/23/79-2.50, 10/30/79-1.25, 11/2/79-2.25, 3/8/79-1.50, 3/31/77-1.50. Now those I compute as equaling 35 hours. And then there are also hours disallowed for conferences with the defendant School Committee and I compute those as 13.25 hours, those being 12/17/80, 12/22/80, 12/31/80, 1/2/81, 1/5/81, 1/7/81, 2/21/81, 2/23/81, 2/24/81, 2/25/8. With that determination behind me I then find hours to be paid at $70 an hour would equal 450.25 minus 11.50 hours that I have already told you about, that being the hours disallowed because they are included in the 114 hours attributed to Cumberland. My problem there is I don't know if I'm deducting them twice or not, and that's the thing that has to be straightened out. The 35 hours for work that could have been done by paralegals, and 13.25

hours for conferences with the School Committee. That then leaves 390.50 hours. 390.50 hours at $70 an hour equals $27,335. Plus 35 hours of paralegal work at the rate of $30 an hour equals $1,050. The total award then would be $28,380, $28,385, plus a 10 percent incentive award of $2,838.50 making a total award of $31,223.50. So gentlemen, that is my tentative opinion in this case. When you receive the transcript of this case I would ask that you pay particular attention to my recitation of the travel of the case and I would like that worked on by both sides so

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that it truly reflects what the travel of this case was, more especially as it pertains to the time of the administrative proceedings and the work done in the administrative proceedings. You will note that I have stated that on January 17th I issued a preliminary injunction directing that the plaintiff child be maintained in a day program, Emma Pendleton Bradley Hospital

at the defendant's expense. There's no question about that, that's what I did and I did it on that date. And I want to check out the record to see if I also ordered at that time that the plaintiff exhaust his state administrative remedies. I think the plaintiff contends that I did order that at the same time, is that correct, Mr. Prescott?

MR. PRESCOTT: It's in your decision but not in the injunction. The injunction says that he's protected while he exhausts administrative remedies and the decision says that's what we should do.

THE COURT: The basic finding then was that he did exhaust his administrative remedies.

MR. PRESCOTT: They had to do that.

THE COURT: Yes, then I certified state law question, then I said the procedural requirements for the various stages of hearings and appeals were followed. I think that followed after that original preliminary injunction.

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MR. PRESCOTT: And after the exhaustion of the remedies.

THE COURT: Yes, but I mean it all started after the injunction, after you came to see me on preliminary injunction.

MR. PRESCOTT: The questions were not certified for almost two years.

THE COURT: No, I don't mean the certification. I mean the state administrative proceedings remedies followed my preliminary injunction.

MR. PRESCOTT: They did entirely.

THE COURT: Am I correct?

MR. PRESCOTT: That's correct.

THE COURT: They were not before, they were following.

MR. PRESCOTT: They followed, that's correct, Judge.

THE COURT: Now what I don't understand, I have a notation that all your appeals were unsuccessful and there was an ultimate filing

of the suit in this court. That's not correct because the suit had already been filed in this court.

MR. PRESCOTT: That's correct, the original complaint was amended to add the state parties as defendants.

THE COURT: That has to be, the plaintiff's

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appeals were unsuccessful and ultimately the complaint in this court was amended. I think that has to be corrected to that effect. That travel has to be ironed out and I'll expect you gentlemen to iron it out. It does not eat at the heart of the opinion at all but it does have to be ironed out and I'll expect you to iron it out and I especially charge you, Mr. Prescott, with doing that.

(Whereupon proceedings concluded.)